



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

June 17, 2003

Mr. Mark Burtner
Lamar County Attorney
119 North Main Street
Paris, Texas 75460

OR2003-4154

Dear Mr. Burtner:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 182836.

The Lamar County Sheriff and Treasurer (the "county") each received a request for information related to a specified bail bonding business. You claim that the requested information is excepted from disclosure under sections 552.103 and 552.104 of the Government Code. You also claim that some of the requested information may be excepted from disclosure under section 552.110 of the Government Code but make no arguments and take no position as to whether the submitted information is so excepted. You inform this office that you have notified the interested third party whose proprietary interests are implicated by the request of the request for information and of his right to submit arguments to this office as to why the requested information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act (the "Act") in certain circumstances). We have considered the claimed exceptions and reviewed the submitted information, which includes representative sample information.¹

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, no interested third party has submitted to this office reasons explaining why its information should not be released. Therefore, the third party has provided us with no basis to conclude that it has a protected proprietary interest in any of the submitted information. *See* Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Thus, no portion of the submitted information may be withheld under section 552.110. Therefore, we address the county's arguments.

Initially, we note that a portion of the information you submitted to this office as responsive to the request constitutes information that is subject to section 552.022 of the Government Code. Section 552.022(a) enumerates categories of information that are public information and not excepted from required disclosure under chapter 552 of the Government Code unless they are expressly confidential under other law. *See* Gov't Code §§ 552.022(a)(3) ("information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body"), 552.022(a)(17) ("information that is also contained in a public court record"). The information subject to section 552.022 must therefore be released unless the information is expressly made confidential under other law. You claim that all of the requested information relates to anticipated litigation. However, section 552.103 of the Government Code is a discretionary exception intended to protect the interests of governmental bodies and is not "other law" that makes information confidential for purposes of section 552.022. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.-Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision No. 522 at 4 (1989) (discretionary exceptions in general). Accordingly, the information that is subject to section

to the extent that those records contain substantially different types of information than that submitted to this office.

552.022 may not be withheld on the basis that it relates to anticipated litigation. However, you also claim that this information is excepted from disclosure under section 552.104, and we will address that argument for the information subject to section 552.022 together with the remaining submitted information. *See* Gov't Code § 552.104(b) (section 552.022 does not apply to information that is excepted from disclosure under section 552.104).

Section 552.104 of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Moreover, section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. Open Records Decision No. 541 at 4 (1990). Section 552.104 does not except information relating to competitive bidding situations once a contract has been awarded. Open Records Decision Nos. 306 (1982), 184 (1978). Section 552.104 protects the interests of governmental bodies, not third parties. Open Records Decision No. 592 (1991). Based on your arguments and our review of the submitted records, we conclude that the county has not demonstrated the applicability of section 552.104 to the information at issue. As such, the county may not withhold any portion of the submitted information under section 552.104.

We note that the submitted information contains a Form 1099. Title 26 section 6103(a) of the United States Code renders tax return information confidential.² The term "return information" includes "the nature, source, or amount of income" of a taxpayer. 26 U.S.C. 6103(b)(2). This term has been interpreted by federal courts to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. *Mallas v. Kolak*, 721 F. Supp. 748 (M.D.N.C. 1989). Because the Form 1099 constitutes tax return information, the county must withhold this information under section 552.101 in conjunction with federal law.

You claim that the submitted information that is not subject to section 552.022 is excepted from disclosure under section 552.103 of the Government Code. Section 552.103 provides as follows:

²Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes.

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date that the request for information was received, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.³ Open Records Decision No. 555 (1990); *see* Open

³In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open

Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

You state that the third party and his attorney "have indicated that they intend to seek a temporary restraining order and injunction preventing the [county] from releasing this information," you do not provide concrete evidence showing that the claim that litigation may ensue is more than mere conjecture. However, you have not provided this office with any evidence that a specific threat to bring suit has actually been made or that the county had any other concrete basis to reasonably anticipate a lawsuit when it received this request for information. *See* Gov't Code § 552.103(c); Open Records Decision Nos. 518 at 5 (1989) (governmental body must furnish evidence that litigation involving specific matter is realistically contemplated and more than mere conjecture), 452 at 4 (1986) (Gov't Code § 552.103 requires concrete evidence showing that claim that litigation may ensue is more than mere conjecture), 331 at 1-2 (1982) (mere chance of litigation not sufficient to trigger Gov't Code § 552.103); *see also* Open Records Decision No. 561 (1990) (fact that requestor has legal remedy to enforce provisions of the Act will not justify withholding information from public disclosure under the Act). Therefore, as you have failed to demonstrate that litigation was reasonably anticipated on the date of the county's receipt of this request for information, the county may not withhold any of the remaining submitted information under section 552.103.

We note, however, that both the records subject to section 552.022 and the remaining submitted information include account numbers. Section 552.136 of the Government Code states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136. We have marked a representative sample of the type of information that the county must withhold pursuant to section 552.136.

We further note that section 552.130 of the Government Code excepts from public disclosure information relating to a driver's license or motor vehicle title or registration issued by an agency of this state. Thus, we have marked the information in the submitted documents that the county must withhold pursuant to section 552.130.

Furthermore, the submitted information contains a social security number. Social security numbers may be withheld in some circumstances under section 552.101 of the Government Code. A social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that any social security number in the file is confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, the county should ensure that no such information was obtained or is maintained pursuant to any provision of law enacted on or after October 1, 1990.

In summary, the county must withhold Form 1099 under section 552.101 in conjunction with federal law. We have marked a representative sample of the type of information that the county must withhold pursuant to section 552.136. We have marked the information in the submitted documents that the county must withhold pursuant to section 552.130. A social security number may be confidential under federal law. The remaining submitted information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by

filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877)673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512)475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code

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§ 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Cindy Nettles", written in a cursive style.

Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jh

Ref: ID# 182836

Enc. Submitted documents

c: Ms. Mary Gibson
Gibson's Bail Bond
1095 S.W. First Street
Paris, Texas 75460
(w/o enclosures)

Mr. Barney Sawyer
Attorney
40 Eighth Street
Paris, Texas 75460
(w/o enclosures)